REMARKS

Reconsideration and withdrawal of the rejections of the claims are requested in view of the following remarks, which place the claims in condition for allowance.

I. STATUS OF CLAIMS AND FORMAL MATTERS

Claims 80-106 are pending in this application. All previously pending claims are cancelled. For the sake of consistency, the present claims have been drafted using language as similar as possible to that in co-pending U.S. Application No. 10/409,391 ("the '391 application"), which is a continuation of the present application. Independent claim 80 is based on cancelled claim 70 and is written using language consistent with that of claim 30 of the '391 application. Dependent claims 81-85 and 87-89 correspond to cancelled claims 71-78. Dependent claims 86 and 90-92 correspond to pending claims 40, 32, 33 and 44 of the '391 application.

Independent claim 93 is also based on cancelled claim 70 and incorporates subject matter of cancelled claims 54-59. Dependent claims 94-104 correspond to dependent claims 81-85 and 87-92.

Claim 105 is supported, for example, by the paragraph beginning at page 15, line 17, of the specification.

Support for the recitation of a "portion of the food material" in claim 106 can be found, for example, on page 14, lines 8-9. Support for a carrier of the enzyme can be found in the paragraph beginning on page 14, line 28.

No new matter is added.

It is submitted that the claims are patentably distinct over the prior art, and that these claims are in full compliance with the requirements of 35 U.S.C. § 112. The amendments to the claims presented herein are not made for purposes of patentability within the meaning of 35 U.S.C. §§ 101, 102, 103 or 112. Rather, these amendments and additions are made simply to clarify the scope of protection to which Applicants are entitled. Furthermore, it is explicitly stated that these amendments should not give rise to any estoppel, as they are not narrowing amendments.

II. THE REJECTIONS UNDER 35 U.S.C. § 102 ARE OVERCOME

Claims 70-79 were rejected under Section 102(b) as allegedly being anticipated by Van Den Ouweland *et al.* To the extent the rejection may be applied to the present claims, it is traversed.

A two-prong inquiry must be satisfied in order for a Section 102 rejection to stand. First, the prior art reference must contain all of the elements of the claimed invention. *See Lewmar Marine Inc. v. Barient Inc.*, 827 F.2d 744, 747, 3 U.S.P.Q.2d 1766 (Fed. Cir. 1987). Second, the prior art must contain an enabling disclosure. *See Chester v. Miller*, 906 F.2d 1574, 1576 n.2, 15 U.S.P.Q.2d 1333, 1336 (Fed. Cir. 1990). The rejection over Van Den Ouweland fails the first prong because it does not contain all of the elements of the claimed invention.

Claim 80 and its dependent claims require a starting material comprising two constituents: a fatty acid ester and glycerol. The food material containing these constituents is contacted with an enzyme having esterase activity to produce emulsifiers in the food material, and the enzyme is subsequently inactivated to produce the desired foodstuff.

Van Den Ouweland contains no teaching of a starting material comprising glycerol. In fact, a search of Van Den Ouweland's entire disclosure reveals no mention of "glycerol," or even the broader terms "polyol" or "sugar alcohol." The glycerol element recited in claim 80 is entirely lacking in Van Den Ouweland.

In addition, as has been argued by the Applicants numerous times, Van Den Ouweland does not teach the production of a foodstuff. There can be no question that Van Den Ouweland relates to the production of a flavoring composition. *See, e.g.*, title; abstract; col. 1, lines 24-25; col. 2, lines 36-37; col. 3, lines 17-20 and 51-54; col. 5, lines30-34. The present claims recite the preparation of a foodstuff. A flavoring composition is not a foodstuff, as is evident by the use of the term "foodstuff" in both the Applicants' disclosure and in Van Den Ouweland itself.

As the Examiner is aware, an Applicant is entitled to be his own lexicographer. *See Vitronics Corp. v. Conceptronics, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); MPEP 2111.01, Section IV. The meaning chosen by the Applicant *must* be used to interpret the words of his claim. *See id.*

The paragraph beginning at page 3, line 28, of the present specification states: "By the term "functional ingredient" we mean a constituent of the foodstuff which performs a specific function in the foodstuff. Preferably by the term 'functional ingredient' we mean an emulsifier,

hydrocolloid, preservative, antioxidant, colouring, **flavouring**, and/or viscosity modifier." (Emphasis added.) *See also* page 15, lines 17-19; Examples 1,-6, 15, 16. Viewed in the context of the entire disclosure, there is no reasonable interpretation of the term "foodstuff" that would permit a flavoring composition to fall within the definition of foodstuff.

Moreover, the disclosure of Van Den Ouweland supports the Applicants' position. "The foodstuffs which comprise the flavoring compositions according to the invention have an enhanced impact and a longer-lasting taste in the mouth, as well as better mouthfeel, than the corresponding foods not flavored according to the invention." Col. 5, lines 39-43. Thus, it is clear from the disclosure of Van Den Ouweland that the inventors there characterize their invention as a component of foodstuffs, and not as a foodstuff in its own right. In sum, any argument that the flavoring composition of Van Den Ouweland is a foodstuff is directly and unambiguously refuted by both the present specification and the disclosure of the cited reference.

The above arguments regarding a foodstuff also apply to independent claim 93 and its dependent claims, and to independent claim 106. In addition, Applicants point out that the recitations of a second constituent in part (a) of claim 93 correspond to the subject matter of cancelled claims 54-59. Reference to the Office Actions dated October 22, 2002 and May 6, 2003 shows that these claims were not included in the Section 102 rejection over Van Den Ouweland. *See* pages 5 and 3, respectively. Therefore, it is already of record in this application that this subject matter is not anticipated by Van Den Ouweland.

Claims 70-79 were rejected under Section 102(b) as allegedly being anticipated by Olesen *et al.* To the extent the rejection may be applied to the present claims, it is traversed. The rejection over Olesen also fails the first prong of the test for anticipation because Olesen does not contain all of the elements of the claimed invention.

As discussed above, claim 80 and its dependent claims require a starting material comprising two constituents: a fatty acid ester and glycerol. The food material containing these constituents is contacted with an enzyme having esterase activity to produce emulsifiers in the food material and the enzyme is subsequently inactivated to produce the desired foodstuff. Like Van Den Ouweland, Olesen does not teach glycerol as a second constituent for generating a second emulsifier, as specifically recited in claim 80. If the Examiner maintains this rejection, she is respectfully asked to point to the particular portion of Olesen that allegedly teaches the production of an emulsifier from glycerol.

With regard to claim 93 and its dependent claims and claim 106, as the Examiner correctly points out, Olesen relates to "the addition of lipase to dough products to be baked." Office Action at 3 (emphasis added). To the contrary, claim 93 and claim 106 are not directed to the production of dough-based foodstuffs. As Olesen does not provide any teachings related to production of the foodstuffs recited in claim 93, it and its dependent claims cannot be anticipated by Olesen. The same is true for claim 106.

Reconsideration and withdrawal of the Section 102 rejections are requested.

CONCLUSION

In view of these amendments and remarks, the application is in condition for allowance. Reconsideration and withdrawal of the rejections of the application, and prompt issuance of a Notice of Allowance, are requested.

Respectfully submitted,

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